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January 21, 2014

Catrice Williams, Secretary
Department of Telecommunications & Cable
1000 Washington Street, Suite 820
Boston, Massachusetts 02118-6500

Re: D.T.C. 13-6 – Agreement of Verizon New England Inc.

Dear Secretary Williams:

Enclosed for filing in the above-referenced proceeding is Verizon New England Inc. d/b/a Verizon Massachusetts' Motion to Strike the Pre-filed Direct Testimony of Joseph Gillan and James Burt.

Thank you for your attention to this matter.

Sincerely,

Alexander W. Moore

Enclosure

cc: Michael Scott, Hearing Officer (2)
Service List

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE

Investigation by the Department on its Own Motion to Determine whether an Agreement entered into by Verizon New England Inc., d/b/a Verizon Massachusetts is an Interconnection Agreement under 47 U.S.C. § 251 Requiring the Agreement to be filed with the Department for Approval in Accordance with 47 U.S.C. § 252	D.T.C. 13-6

MOTION TO STRIKE THE PRE-FILED DIRECT TESTIMONY OF JOSEPH GILLAN AND JAMES BURT

Verizon New England Inc., d/b/a Verizon Massachusetts ("Verizon MA") hereby requests that the Department of Telecommunications and Cable ("Department") strike the pre-filed testimony of Joseph Gillan and James R. Burt insofar as they offer legal opinions or improper opinion testimony as to Verizon MA's intent.[1]

Neither Mr. Gillan nor Mr. Burt adds *a single fact* to the record before the Department. For example, even though Sprint told the Federal Communications Commission in July 2013 that it "currently has IP interconnection agreements with 12 major carriers,"[2] Mr. Burt says *nothing* about any of those agreements. Instead, both Mr. Gillan's and Mr. Burt's testimony read like legal briefs that the Competitive Intervenors and Sprint could be expected to file in support of summary judgment motions. Mr. Gillan himself recognized as much, stating that "additional legal analysis" — that is, in addition to what is found in his testimony — "will be provided (as

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[1] Specifically, the Department should strike Mr. Gillan's testimony except for the following, limited portions: pages 1-3 (Mr. Gillan's background and qualifications); page 7, lines 4-11 (policy discussion); page 9, line 11 to page 10, line 20 (a description of the agreements the Department is reviewing and Verizon MA discovery responses regarding the same); and page 16, line 22 to page 17, line 2 (a description of a Verizon MA discovery response). The Department should strike Mr. Burt's testimony except for the following limited portions: pages 1-3 (Mr. Burt's background and qualifications), page 4, line 16 to page 7, line 9 (policy discussion), and page 26, line 7 to page 27, line 14 (policy discussion).

[2] Comments of Sprint Nextel Corporation, *Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, GN Docket No. 13-5, at 6 (FCC filed July 8, 2013).

appropriate) in the briefs and motions . . . contemplated by the Department's procedural schedule."[3]

Massachusetts state courts have long held that the "opinion of a witness respecting a question of law is incompetent."[4] The Massachusetts federal courts apply the same rule, holding that "expert testimony proffered solely to establish the meaning of a law is presumptively improper."[5] That is because the Department's hearing room, like a courtroom, "comes equipped with a 'legal expert,' called a judge" — or Hearing Examiner — and the adjudicator's "expert knowledge of the law makes any such assistance at best cumulative, and at worst prejudicial."[6]

Despite this, the testimony of both Mr. Gillan and Mr. Burt is replete with legal opinions. Mr. Gillian identifies what he believes are the relevant portions of relevant FCC orders and offers his interpretation of legal import.[7] For example, he asserts that the "FCC's *ICC Reform Order* leaves no doubt that the VoIP Agreement satisfies the standard as an Interconnection Agreement."[8] Mr. Burt similarly discusses what he believes is the legal import of portions of FCC orders,[9] as well as of portions of the Communications Act and the FCC's regulations.[10] Both argue that the Department should follow decisions of certain other state public utility

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3 Gillan at 4 n.1.

4 *Commonwealth v. O'Connor*, 387 N.E.2d 190, 195 (Mass. App. Ct. 1979) (citing *Moskow v. Burke*, 152 N.E. 321, 323 (Mass. 1926); *see Horvath v. Adelson, Golden & Loria, P.C.*, 773 N.E.2d 478 n.9 (Mass. App. Ct. 2002) ("an expert cannot give a legal opinion").

5 *United States v. Prigmore*, 243 F.3d 1, 18 n.3 (1st Cir. 2001).

6 *Nieves-Villanueva v. Soto-Rivera*, 133 F.3d 92, 100 (1st Cir. 1997) (internal quotation marks omitted).

7 *See* Gillan at 5:10-7:2, 11:12-13:14, 15:1-16:20.

8 *Id.* at 15:10-11.

9 *See, e.g.*, Burt at 11:17-12:25, 19:10-24:11.

10 *See, e.g., id.* at 7:13-11:15, 25:5-26:5.

commissions, while distinguishing contrary decisions — also precisely the kind of argument normally found in legal briefs.[11]

In addition, expert testimony purporting to describe the intent of a party is also routinely inadmissible. A court "does not need an expert witness to help it determine the defendant's intentions."[12] Indeed, "musings as to defendants' motivations would not be admissible if given by any witness — lay or expert."[13] Yet both Mr. Gillan and Mr. Burt attempt to offer their opinion as to Verizon MA's motivations.[14] Such expert testimony is equally improper and should be stricken.

Unlike Verizon MA's pre-filed testimony, which provided the Department with relevant facts and discussion of applicable policies, the Gillan and Burt pre-filed testimony are legal briefs in (the flimsiest) disguise. The hearing before the Department should be focused on establishing facts relevant to the Department's decision on the legal issue that is for it — not purported experts from any party — to decide. Allowing the Competitive Intervenors and Sprint to introduce their legal arguments into the record through pre-filed testimony would distract from that purpose and lengthen the hearing unnecessarily. The Department should therefore strike the overwhelming majority of Mr. Gillan's and Mr. Burt's pre-filed testimony, leaving only the limited portions (listed in footnote 1) that address proper topics for testimony.

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[11] *See* Gillan at 17:4-18:17; Burt at 13:5-19:8.

[12] *Vaulting & Cash Servs., Inc. v. Diebold Inc.*, No. Civ. A. 97-3686, 1998 WL 726070, at *1 (E.D. La. Oct. 15, 1998), *aff'd*, 199 F.3d 440 (5th Cir. 1999) (unpublished); *see also Advanced Tech. Incubator, Inc. v. Sharp Corp.*, No. 5:09-CV-00135, 2010 WL 1170256, at *6 (E.D. Tex. Mar. 22, 2010) (Bryant, M.J.) (granting motion to strike portions of expert report reflecting expert's opinion on party's intent); *Beauregard Parish Sch. Bd. v. Honeywell, Inc.*, No.2:05 CV 1388, 2008 WL 821053, at *5 (W.D. La. Mar. 24, 2008) (granting motion to exclude and noting, "Courts do not permit experts to testify on the parties' state of mind or subjective intentions.").

[13] *Taylor v. Evans*, No. 94 Civ. 8425 (CSH), 1997 WL 154010, at *2 (S.D.N.Y. Apr. 1, 1997).

[14] *See* Gillan at 8:7-9:7 (opining that Verizon MA's "behavior in its proceeding suggest[s] that its *intention* is to discriminate among carriers"); Burt at 23:8-24:4 (speculating as to the "intent" of incumbent LECs regarding the transition to IP VoIP interconnection").

CONCLUSION

For these reasons, Verizon MA urges the Department to grant this motion to strike.

Respectfully submitted,

VERIZON NEW ENGLAND INC.

By its attorneys,

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